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In The

Supreme Court of the United States

ALABAMA-TOMBIGBEE RIVERS COALITION, et al.,

Petitioners,

v.

DIRK KEMPTHORNE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION AND WESTLANDS WATER DISTRICT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are as follows:

The National Water Resources Association (NWRA) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in water quantity and quality issues in the western states. The NWRA includes some of the nation's largest water districts, including the Central Arizona Water Conservation District (Arizona), Colorado River Water Conservation District (Colorado), Middle Rio Grande Conservancy District (New Mexico), and Las Vegas Valley Water District (Nevada).

The Westlands Water District (WWD), located in Fresno and King Counties, California, is the nation's largest agricultural water district in terms of irrigated acreage. WWD provides irrigation water to farmers located in its service area, as well as water to cities and towns, industries, residential users and others located in its service area.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution to its preparation or submission. No person other than *amici*, or their members or counsel, made such a monetary contribution.

The *amici* are, or represent, water districts and agencies that provide water supplies for urban, agricultural and industrial uses and power generation in the western states. They acquire most or all of their water supplies from federal, state and local water projects, pursuant to contracts entered into with the agencies that operate the projects. The Eleventh Circuit decision below holds that the Endangered Species Act (ESA) authorizes and mandates the U.S. Fish and Wildlife Service to list a species – in this case, the Alabama sturgeon – as endangered, even though the species is found in a single state and does not have interstate commercial effects. The listing of an endangered species under the ESA triggers various statutory requirements and prohibitions, principally that a federal agency may not take action that "jeopardize[s]" a listed species, 16 U.S.C. § 1536(a)(2), and that no person may "take" a listed species, *id.* at § 1538(a)(1)(B). Under the Eleventh Circuit's construction, the water projects that supply water to the *amici* may be prohibited from delivering the full amount of the contracted-for supplies if this would affect an intrastate, non-commercial species, because such deliveries would violate either the "jeopardy" or "take" prohibitions of the statute. This statutory construction would impair the *amici*'s rights to receive water supplies from the projects. Indeed, as this brief will explain, a federal district court in California recently ordered the federal and state water projects in California, which provide most of California's water supplies for urban and agricultural users, to substantially reduce their water deliveries

in order to benefit a listed endangered species found solely in California and that does not have interstate commercial effects. Thus, the question presented here substantially, and directly, affects the rights and interests of the *amici*.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT ISSUE CONCERNING THE SCOPE OF THE FEDERAL COMMERCE POWER.

This case raises an important question concerning the scope of Congress' powers under the Constitution's Commerce Clause. The question is whether the Endangered Species Act (ESA) is constitutional as applied to an intrastate endangered species that does not have interstate commercial effects. The case presents an "as applied" challenge to the ESA's constitutionality, not a facial challenge. This Court has never decided this significant constitutional issue. The decision below conflicts with this Court's recent decisions defining the scope of Congress' commerce powers. Therefore, this Court should review the lower decision and resolve the constitutional issue. *See* Supreme Court Rule 10(c).

A. The Federal Commerce Power: *Lopez*, *Morrison* and *Raich*

As this Court has often held, the Constitution delegates specific powers to the federal government

and reserves to the states the powers not delegated. *United States v. Lopez*, 514 U.S. 549, 552 (1995). The federal government's delegated powers include the power, delegated by the Commerce Clause, to regulate commerce among the states. U.S. Const., Art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 552-559; *Gibbons v. Ogden*, 22 U.S. 1 (1824). Under this Court's modern jurisprudence, the Commerce Clause authorizes Congress to regulate the channels and instrumentalities of interstate commerce, and also activities that substantially affect interstate commerce. *Lopez,* 514 U.S. at 558-559; *United States v. Morrison,* 529 U.S. 598, 608-609 (2000); *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). This case, like most recent cases involving interpretations of the federal commerce power, addresses whether the regulated activity substantially affects interstate commerce.

This Court has in its history invalidated several congressional enactments on grounds that the regulated activities did not substantially affect interstate commerce and Congress had thus exceeded its commerce powers. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 545-548 (1935); *Adair v. United States*, 208 U.S. 161 (1908). From the mid-1930s to the mid-1990s, however, this Court consistently sustained Congress' exercise of its commerce powers, and deferred to Congress' judgment that the regulated activity affected interstate commerce. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones &*

Laughlin Steel Corp., 301 U.S. 1 (1937). In *Wickard*, this Court adopted the aggregation principle in sustaining the congressional regulation; this principle holds that Congress may regulate an entire class of producers whose collective product substantially affects interstate commerce, even though the production of individual class members may not have this effect. *Wickard*, 317 U.S. at 127-128. As this Court has stated, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Raich*, 545 U.S. at 17, *quoting from Lopez*, 514 U.S. at 558, *quoting from Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968).

In two recent decisions, however, this Court made clear that Congress' commerce power, although broad, is not unlimited, and that Congress may not freely legislate in areas traditionally regulated by the states. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). In *Lopez*, the Court invalidated a federal statute prohibiting the possession of guns near schools, on the ground that the regulated activity did not substantially affect interstate commerce. In *Morrison,* the Court invalidated a federal statute providing a remedy for gender-based acts of violence on the same ground.

The *Lopez* and *Morrison* decisions established several important principles governing the scope of the federal commerce power. First, the commerce power applies to activities that substantially affect

interstate "commerce," and "commerce" denotes economic activity. *Lopez,* 514 U.S. at 559, 560-561 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *Morrison*, 529 U.S. at 610-611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.") Second, the congressional regulation must have a "jurisdictional element" that limits the regulation to specific activities affecting interstate commerce; this allows the courts to determine on a case-by-case basis whether the specific regulated activity affects such commerce. *Lopez,* 514 U.S. at 561-562; *Morrison*, 529 U.S. at 611-612. Third, although congressional findings are relevant in determining whether the regulated activity affects interstate commerce, such findings are not entitled to weight if Congress employs a different standard from the "substantially affects" test developed by this Court. *Lopez,* 514 U.S. at 562-563; *Morrison*, 529 U.S. at 612, 614-616. Finally, the link between the congressional regulation and interstate commerce must be substantial and not attenuated; if the link is attenuated, Congress' power to regulate would have no logical stopping point, and Congress would possess the equivalent of the general police power retained by the states. *Lopez,* 514 U.S. at 563-568; *Morrison,* 529 U.S. at 612-613. The ultimate test of the statute's constitutionality is whether the regulated activity affects national or local interests; "[t]he Constitution

requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 618-619.

The *Lopez* and *Morrison* decisions also limited *Wickard*'s aggregation principle, stating that the principle generally applies only to regulation of *economic* activity. *Morrison,* 529 U.S. at 613 (although the Court need not adopt a "categorical rule against aggregating the effects of any noneconomic activity," "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.") The *Lopez* and *Morrison* decisions declined to apply the aggregation principle because, as stated in *Lopez,* the criminal statute in that case was "not part of a larger regulation of *economic* activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." 514 U.S. at 561 (emphasis added). Thus, the decisions hold that aggregation is permissible if failure to aggregate would undermine a broad congressional scheme regulating economic activity.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court sustained the constitutionality of another criminal statute, the Controlled Substances Act, as applied to the use of marijuana for medicinal purposes. The Court upheld the statute because the regulated activity – the marketing of drugs – is "quintessentially economic," in that it involves the "production, distribution, and consumption of commodities." *Raich,* 545 U.S. at 25. *Raich* distinguished

Lopez and *Morrison* on grounds that those cases, unlike *Raich*, did not involve the regulation of economic activity. *Id.* Applying the *Wickard* aggregation principle, *Raich* held that Congress had adopted a comprehensive scheme regulating the interstate marketing of drugs, and the use of marijuana for medicinal purposes was "an essential part of the larger regulatory scheme"; although marijuana use for medicinal purposes may be a "separate and distinct class" of activity that has no interstate commercial effects, Congress may regulate that separate activity as part of its comprehensive regulation of the interstate marketing of drugs. *Id.* at 26-27. Thus, *Raich* sustained the congressional regulation by aggregating the regulated activities, just as *Wickard* had done. *Id.* at 25. Indeed, *Raich* observed that "[t]he similarities between this case and Wickard are striking." *Id.* at 18.

Raich is compatible with *Lopez* and *Morrison* because *Raich* involved the regulation of economic activity and *Lopez* and *Morrison* did not. Because of this difference, *Raich* aggregated the regulated activity and upheld the regulation, while *Lopez* and *Morrison* declined to aggregate the activity and struck down the regulations. These decisions make clear that otherwise local activities can be aggregated, and regulated, under the Commerce Clause if they are economic rather than non-economic in nature.

B. Applicability of Federal Commerce Power To Endangered Species Act

This Court has never applied its Commerce Clause jurisprudence – particularly as developed in *Lopez, Morrison* and *Raich* – to determine the constitutionality of a federal environmental statute that was adopted for conservation purposes rather than to regulate economic activity.[2] This case directly raises this unresolved constitutional issue. The question is whether the ESA, which was enacted to preserve species from extinction rather than for an economic purpose, is within the congressional commerce power as applied to intrastate species that have no commercial effects. Stated differently, the question is whether the Commerce Clause – which authorizes regulation of "commerce" among the states – sustains congressional regulation of species that do not affect such commerce. The question may turn on whether *Wickard*'s aggregation principle, which applies to economic regulation, extends to non-economic regulation, such as the ESA. These significant constitutional issues are worthy of this Court's review.

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[2] In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), this Court upheld the constitutionality of the Surface Mining Control and Reclamation Act, which regulated the commercial activity of surface mining. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-174 (2001), this Court declined to reach a constitutional challenge to the Army Corps of Engineers' jurisdiction to regulate "isolated" wetlands, holding instead that the Clean Water Act does not authorize such regulation.

In the case below, the Eleventh Circuit held that the ESA is constitutional as applied to the endangered Alabama sturgeon because this species is part of the "genetic diversity," or "biodiversity," that includes all species, and all species form part of different "ecosystems." Pet. App. A42-A43, A45-A46. The court determined that all species, taken together, have commercial value, because they provide benefits to medicine as well as agriculture and aquaculture. *Id.* at A42. The court also concluded that some endangered species – potentially including the Alabama sturgeon, which at one time was commercially harvestable, *id.* at A46 – have distinct commercial benefits by encouraging tourism, fishing and hunting. *Id.* at A43. The court concluded that it is appropriate to "aggregate" all endangered species for Commerce Clause purposes – even species that do not affect interstate commerce – because Congress regulated all such species as part of a comprehensive system of regulation. *Id.* at A44.

The Eleventh Circuit's decision is not consistent with the Commerce Clause principles developed in *Lopez*, *Morrison* and *Raich*. As noted above, *Lopez* and *Morrison* held that the federal commerce power applies to activities that substantially affect interstate "commerce," and that commerce denotes "economic" activity. *Lopez,* 514 U.S. at 560-561; *Morrison,* 529 U.S. at 610-611. Although some, and perhaps many, endangered species may affect interstate commerce – such as by promoting tourism, hunting, and fishing – many endangered species do not have

these effects. Thus, the Commerce Clause does not authorize regulation of all endangered species regardless of their interstate commercial effects, contrary to the Eleventh Circuit decision. To be sure, *Lopez*, *Morrison* and *Raich* held that economic activities can be aggregated under the Commerce Clause (and *Raich* aggregated the economic activities in that case), but the decisions made clear that aggregation applies to economic but not non-economic regulation – and the ESA is a form of non-economic regulation. The Eleventh Circuit decision extends the aggregation principle – and Commerce Clause regulation – beyond the bounds recognized in *Lopez*, *Morrison* and *Raich*. The decision creates an open-ended federal commerce power, one that has no logical stopping point. *Lopez* and *Morrison* plainly held that the Commerce Clause does not extend this far.

The Commerce Clause principles described in *Lopez* and *Morrison*, as well as *Raich*, recognize that our constitutional system of federalism is based on a division, and hence a balance, of sovereign national power between the federal government and the states. As Justice Kennedy has observed, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one," and "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez,* 514 U.S. at 576 (Kennedy, J., concurring). The

"substantially affects" test applicable under the Commerce Clause effectuates the constitutional balance of power, by limiting the federal government's power to regulate activities traditionally regulated by the states. Indeed, this Court has adopted analogous balancing tests in construing federal environmental statutes, such as the Clean Water Act, in part to avoid the constitutional issue of whether Congress may regulate land and water uses traditionally regulated by the states. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-174 (2001) (holding that Army Corps of Engineers does not have jurisdiction under Clean Water Act to regulate non-navigable waters unless they have "significant nexus" to navigable waters, and that contrary interpretation would result in "significant impingement of the States' traditional and primary authority over land and water use" and would "significantly change[] the federal-state balance"); *Rapanos v. United States*, 126 S.Ct. 2208, 2236 (2006) (Kennedy, J., concurring) (applying same "significant nexus" test in determining whether Army Corps of Engineers has jurisdiction to regulate non-navigable wetlands). The Eleventh Circuit decision, on the other hand, is devoid of any balancing of federal and state powers, and concludes simply that Congress may regulate all endangered species in all circumstances regardless of whether they have interstate commercial effects. The decision is plainly inconsistent with the Commerce Clause principles developed in *Lopez*, *Morrison* and *Raich*.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE FEDERAL CIRCUIT COURTS REGARDING THE PROPER CONSTITUTIONAL RATIONALE FOR THE ISSUE PRESENTED HERE.

Prior to this case, four federal circuit courts have addressed the ESA's constitutionality as applied to individual endangered species, and all four courts upheld the ESA's constitutionality as applied and this Court denied review of all four cases. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *rehearing en banc denied*, 334 F.3d 1158, *cert. denied*, 540 U.S. 1218 (2004); *GDF Realty, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *rehearing en banc denied*, 362 F.3d 286 (2004), *cert. denied*, 545 U.S. 1114 (2005). The circuit court decisions, however, adopted conflicting constitutional rationales to support their conclusions, and these conflicting rationales would lead to different outcomes of the same case. Moreover, vigorous dissenting opinions were filed in all four cases, dissenting either from the panel decision or the decision denying rehearing *en banc*, thus signaling the disagreement among the circuit court judges concerning this constitutional issue. This Court should review this case to resolve the conflict among the circuit courts regarding the proper constitutional rationale, and to otherwise

resolve this important and contentious constitutional issue. *See* Supreme Court Rule 10(a).

Indeed, then-Judge Roberts, while sitting on the District of Columbia Court of Appeals, dissented from the denial of rehearing *en banc* in one of these cases on the ground that *en banc* review was necessary to resolve the intercircuit conflict regarding the proper constitutional rationale. *Rancho Viejo, rehearing en banc denied*, 334 F.3d 1158, 1160 (Roberts, J., dissenting). He argued that "[e]n banc review is appropriate because the approach of the panel in this case and *NAHB* [*National Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)] now conflicts with the opinion of a sister circuit [*GDF Realty Investors, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)] – a fact confirmed by that circuit's quotation from the *NAHB* dissent." *Id.* Thus, then-Judge Roberts perceived a "conflict[]" among the circuit courts on the constitutional issue raised here, which of course is not only a ground for rehearing *en banc* but also a ground for review by this Court.[3]

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[3] Under Supreme Court Rule 10(a), the Court may review a circuit court decision that is in "conflict" with another circuit court decision "on the same important matter." Then-Judge Roberts' dissenting opinion indicates that an intercircuit "conflict" may exist when the circuit courts – although agreeing on the outcome of a constitutional issue – adopt conflicting rationales to support the outcome.

A. Circuit Court Decisions Addressing ESA's Constitutionality

The four circuit court decisions addressing the ESA's constitutionality are as follows:

1. *National Ass'n of Home Builders v. Babbitt ("NAHB")*, 130 F.3d 1041 (D.C. Cir. 1997)

The District of Columbia Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of the Delhi Sands Flowering-Loving Fly. The three judges, unable to agree on a conclusion or rationale, wrote three separate opinions. Judge Wald wrote that the ESA is constitutional as applied because it regulates the "channels" of interstate commerce; endangered species are part of "biodiversity"; endangered species may lead to important medical discoveries; and Congress adopted findings describing the importance of endangered species in maintaining our "ecosystem." 130 F.3d at 1043-1057. Judge Henderson disagreed with many of Judge Wald's conclusions, particularly those involving the "channels" of interstate commerce and the possibility of medical discoveries, and stated that it is "impossible to ascertain" whether endangered species will lead to medical discoveries. *Id.* at 1057-1060. She argued, however, that the ESA is constitutional as applied because there is an "interconnection of the various species and ecosystems" and "the extinction of one species affects others and their ecosystems." *Id.* Judge Sentelle, dissenting, argued that the ESA is

unconstitutional as applied because "the Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems'" and the ESA does not regulate "commerce." *Id.* at 1060-1067.

2. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000)

The Fourth Circuit, in a 2-1 panel decision, held that the ESA is constitutional as applied to the taking of red wolves. The majority decision upheld the ESA's constitutionality because the wolves affect interstate commerce – they provide the basis for tourism, scientific research, and commercial pelt trade. 214 F.3d at 492. The decision also held that since the wolves generally involved economic activity, the taking of individual wolves can be aggregated under *Wickard*. *Id.* at 493. Thus, the decision upheld the ESA's constitutionality because of the commercial nature of the regulated species, not, as in *NAHB*, because of the "biodiversity" of all species. Judge Luttig, dissenting, argued that the ESA is unconstitutional as applied because the taking of the wolves does not constitute "economic activity," and the regulation "implicates but a handful of animals, if even that, in one small region of one state." *Id.* at 506.

3. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003)

The District of Columbia Circuit held that the ESA was constitutional as applied to the taking of the

arroyo toad. The court reasoned that the ESA regulates the *actor* who takes the species – often a developer engaged in commercial activity – and does not regulate the *species* itself; "[t]he ESA," the court stated, "regulates takings, not toads." 323 F.3d at 1073. The court adopted an entirely different rationale than *NAHB* and *Gibbs*, by considering whether the actor is engaged in interstate commerce rather than whether the species affects such commerce.

The court denied rehearing *en banc*, with two judges dissenting. 334 F.3d 1158 (2003). One of the dissenting judges, then-Judge Roberts, asserted that the majority opinion "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Id.* at 1160 (Roberts, J., dissenting) (original emphasis). Then-Judge Roberts stated that "[t]he panel's approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce . . . among the several States.'" *Id.* As noted above, then-Judge Roberts stated that *en banc* review was appropriate because the panel decision and the court's earlier decision in *NAHB* "conflicts" with the Fifth Circuit decision in *GDF Realty Investors, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003), discussed below. *Id.*

4. *GDF Realty Investments, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003)

The Fifth Circuit held that the ESA is constitutional as applied to the taking of cave species. The court rejected the rationale of the District of Columbia Circuit in *Rancho Viejo*, stating that the ESA regulates the taking of the species rather than the actor's commercial development. 326 F.3d at 634-637. The court also concluded that the cave species, unlike the wolves in *Gibbs*, "are neither economic nor commercial," because "[t]here is no market for them." *Id.* at 638. The court concluded, nonetheless, that regulation of the cave species is "part of a larger regulation of activity," and the ESA's protection of endangered species is "economic in nature" because of "the 'incalculable' value of the genetic heritage that might be lost absent regulation." *Id* at 640. The taking of the species, the court stated, threatens the "interdependent web" of all species, because "the extinction of any species risks the extinction of all species and thus could lead to the extinction of ecosystems." *Id.* Thus, the court applied the aggregation principle to all species because they are part of an "interdependent web" of "ecosystems."

The court denied rehearing *en banc*, with six judges dissenting. 362 F.3d 286 (2004). The dissenting opinion, written by Judge Edith Jones, argued that the panel decision failed to apply the factors described in *Lopez* and *Morrison*, and that the taking of the cave species does not affect interstate commerce or involve economic activity. *Id.* at 288-292.

The dissenting opinion agreed that some endangered species takes may be aggregated, and regulated, as in the case of the red wolves in *Gibbs*, because these species have interstate commercial effects, such as by encouraging hunting, tourism and scientific research. *Id.* at 292. The dissenting opinion argued, however, that the panel decision's theory that all species can be regulated as part of an "interdependent web" is flawed, because this theory would allow Congress to regulate land uses traditionally regulated by the states, thus obliterating the line between what is national and what is local. *Id.* at 292-293. "The Commerce Clause," the dissenting opinion argued, "does not regulate crime, sexual inequality, or ecosystems as such – it regulates commerce." *Id.* at 294.

B. The Conflicts Among the Circuit Court Rationales

The rationales adopted by the circuit courts in the above cases are in conflict. The Fourth Circuit in *Gibbs* held that the ESA is constitutional as applied to species that have interstate commercial effects, such as by encouraging tourism, trade and research. 214 F.3d at 492. The Fifth Circuit in *GDF Realty* (as well as the two majority judges of the District of Columbia Circuit in *NAHB*) held that the ESA is constitutional in all circumstances because it preserves "biodiversity" and "ecosystems." *GDF Realty*, 326 F.3d at 640; *NAHB,* 130 F.3d at 1043-1057 (Wald, J.), 1057-1060 (Henderson, J.) The District of Columbia Circuit in *Rancho Viejo* held that the ESA is

constitutional as applied to actors engaged in commercial activity, regardless of whether the species has commercial effects. 323 F.3d at 1073. In short, the Fourth Circuit focused on the *regulated* species, the Fifth Circuit (and the *NAHB* majority) on *all* species, and the District of Columbia Circuit (in *Rancho Viejo* but not *NAHB*) on the *actor*.

The Fourth Circuit's theory in *Gibbs* – which focuses on the regulated species – suggests that the ESA is *not* constitutional as applied to species that do *not* have interstate commercial effects. This theory conflicts with the Fifth Circuit's theory in *GDF Realty* that the ESA is constitutional in *all* circumstances because it preserves the "independent web" of "ecosystems." Similarly, the Fifth Circuit in *GDF Realty* flatly rejected the theory of the District of Columbia Circuit in *Rancho Viejo* that the constitutional issue turns on whether the *actor* is engaged in commercial activity, rather than whether the *species* affects interstate commerce. *GDF Realty*, 326 F.3d at 634-637. Obviously the outcome of a particular case may be different depending on which, if any, of these theories applies. A constitutional focus on the *regulated* species may lead to a different outcome than a focus on *all* species, just as a constitutional focus on the *actor* may lead to a different outcome than a focus on the *species*.

Not surprisingly, the circuit courts also disagreed on whether and how to apply the *Wickard* aggregation principle, which is the linchpin of Congress' power to regulate purely intrastate activities. *Gibbs*

held that aggregation applies to individual wolves if the regulated community of wolves has interstate commercial effects. 214 F.3d at 493. *GDF Realty*, on the other hand, held that aggregation applies to all species because all species are part of an "interdependent web" of "ecosystems." 326 F.3d at 640. Thus, *Gibbs* applied aggregation to the *regulated* species and *GDF Realty* to *all* species.

The Eleventh Circuit in the instant case adopted the "biodiversity" and "ecosystems" theory applied by the Fifth Circuit in *GDF Realty* and the two majority judges of the District of Columbia Circuit in *NAHB*. Pet. App. A42-A43, A45-A46.[4] The Eleventh Circuit decision conflicts with the Fifth Circuit decision in *Gibbs* – which focused on the commercial effects of the regulated species – and with the District of Columbia Circuit decision in *Rancho Viejo*, which focused on the commercial activities of the actor. The Eleventh Circuit aggregated all species, contrary to the *Gibbs* view that only the regulated species can be aggregated. While the *Gibbs* theory *limits* the ESA's constitutional reach, the Eleventh Circuit's theory *expands* the ESA's constitutional reach beyond any

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[4] On the other hand, one of the two majority judges in *NAHB* rejected the argument, accepted by the Eleventh Circuit here, Pet. App. A42, A44-A45, that endangered species will lead to medical discoveries, and stated that it is "impossible to ascertain" whether this will occur. *NAHB*, 130 F.3d at 1058 (Henderson, J., concurring). Thus, a majority of the District of Columbia Circuit panel rejected the Eleventh Circuit's "medical discoveries" theory.

limits. This Court should grant review to resolve the conflict between the Eleventh Circuit decision and *Gibbs* and *Rancho Viejo*, as well as the conflict among the various decisions themselves.

In our view, the *Gibbs* theory is consistent with this Court's analyses in *Lopez*, *Morrison* and *Raich* and the theories adopted by the other circuit courts – including the Eleventh Circuit here – are not. The *Gibbs* theory focuses on the commercial effects of the regulated species – rather than the commercial effects of *all* species or the actor's development project – and allows aggregation of individual species members if the larger regulated species has interstate commercial effects. As the dissenting opinion in *GDF Realty* argued, the *Gibbs* theory is consistent with the principles established in *Lopez* and *Morrison* because it ensures that the link between congressional regulation and interstate commerce is substantial and not attenuated; the *Gibbs* theory establishes a logical stopping point to the congressional commerce power, and limits Congress' power to intrude into areas traditionally regulated by the states. *GDF Realty*, *rehearing en banc denied*, 362 F.3d at 288-294 (Jones, J., dissenting). The proper inquiry in this case is whether the Alabama sturgeon has interstate commercial effects, not whether the sturgeon is part of the world's ecological system, which it undeniably is. This Court should review and reverse the Eleventh Circuit decision not only because it fails to properly apply Commerce Clause principles, but also to resolve

the intercircuit conflict regarding the proper constitutional rationale.

III. THE APPLICATION OF THE ENDANGERED SPECIES ACT TO INTRASTATE, NON-COMMERCIAL SPECIES HAS OBSTRUCTED, AND IS OBSTRUCTING, WATER DEVELOPMENT THAT IS NECESSARY FOR THE ECONOMIC GROWTH OF THE WESTERN STATES.

The question presented here is vitally important in California and other western states, which, because of their arid or semi-arid conditions, depend on water development for their economic growth, but where a high percentage of the nation's listed endangered species is found.[5] Some federal courts, applying the ESA, have required federal and state water projects in the western states to substantially reduce water supplies to urban and agricultural users in order to benefit intrastate, non-commercial endangered species. Thus, the question raised here significantly affects the economy of the western region, by affecting the water supplies necessary for its development.

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[5] According to the U.S. Fish and Wildlife Service website, California has 309 listed endangered species, which, except for Hawaii, is more than triple the number of listed endangered species in any other state. *See* http://ecos.fws.gov/tess_public/StateListing.do?state=all.

In California, for example, the federal Central Valley Project (CVP) and California's State Water Project (SWP) are the primary sources of the state's developed water supplies. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-736 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1957); *United States v. State Water Resources Control Bd.*, 182 Cal.App.3d 82, 97-111 (1986). The CVP and SWP provide drinking water to millions of residents and irrigation water to the agricultural industry, the nation's largest. The projects store water in upstream dams and reservoirs; the waters, when released, flow downstream to the Delta where the Sacramento and San Joaquin Rivers meet; and the projects then distribute the water from the Delta – the hub of California's water network – to urban and agricultural users located elsewhere. A federal district court in California recently held that a biological opinion for the CVP issued by the U.S. Fish and Wildlife Service violated the ESA because the opinion failed to adequately protect the Delta smelt, a tiny fish found in the Delta that has no commercial value or effects. *Natural Resources Defense Council, et al. v. Kempthorne*, 2007 U.S. Dist. LEXIS 42263 (E.D. Cal., May 25, 2007). The district court subsequently ordered the CVP and SWP, which are operated coordinately, to substantially reduce their water deliveries from the Delta to urban and agricultural users in order to

benefit the smelt.[6] The district court order will, according to California Department of Water Resources officials, likely cause the projects to reduce their water supplies to urban residents and farmers by about one-third, which, according to California Governor Arnold Schwarzenegger, will cause "a devastating blow to our water system and state economy." "Smelt Ruling May Cut Into Water Supply," Los Angeles Times, p. B1 (Sept. 1, 2007). *Id.* In effect, the application of the ESA to a single intrastate, non-commercial species will cause California to lose one-third of its water supplies, which will likely trigger the devastating economic effects predicted by California's governor.

In New Mexico, the federal government operates several major water projects in the Rio Grande – principally the Middle Rio Grande Project and San Juan Chama Project – that deliver water to cities, including the City of Albuquerque, and farming districts in New Mexico. The Tenth Circuit, in a 2-1 panel decision, recently held that a biological opinion for the projects issued by the U.S. Fish and Wildlife Service violated the ESA because it failed to adequately protect the silvery minnow, a listed

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[6] The district court orally announced its order at a hearing on August 31, 2007, and stated that it intends to issue a written order later. *See* Hearing re Interim Remedies Ruling, Reporter's Partial Transcript of Proceedings, *Natural Resources Defense Council v. Kempthorne*, No. 05-CV-1207-OWW (E.D. Cal., Aug. 31, 2007).

endangered species found only in New Mexico that has no commercial value. *Silvery Minnow v. Keyes*, 333 F.3d 1109 (10th Cir. 2003), *partially vacated as moot*, 355 F.3d 1215 (2004). The Tenth Circuit, affirming the district court decision, ordered the projects to substantially reduce water deliveries to the cities and farming districts in order to benefit the silvery minnow. Although Congress subsequently overturned a portion of the decision,[7] the decision effectively reallocated a substantial portion of New Mexico's water supply for the benefit of an intrastate species that has no interstate commercial effects.

As these cases demonstrate, the question presented here has significant economic consequences in the western states, which depend on water development for their economic sustenance, and these consequences may be felt in the national economy to the extent it is formed by the western states' economy. The question presented here has far-reaching economic significance beyond its importance as a matter of constitutional law.

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[7] Congress overturned the Tenth Circuit decision as applied to the San Juan Chama Project but not the Middle Rio Grande Project. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 208(a), 117 Stat. 1827 (Dec. 1, 2003).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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